83 - 1376

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ALEXANDER L. STEVAS, CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1983

MARTIN ROOFING, INC.,

Petitioner,

against

SHELDON S. GOLDSTEIN, also known as SHELLY GOLDSTEIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This case presents the opportunity for this Court to review the question of whether a court taking the case from the jury after the verdict, violates the constitutional mandate of the right to trial by jury in civil cases.

2. There is no question that under present law the court has the right to take the case from the jury. The question presented in this writ is whether it is constitutional for a court to conclude that a jury verdict is not supported by the evidence. Absent fraud or an improper charge, all the court does is substitute its judgment for that of the jury. When the court does this it violates the appellant's constitutional right to trial by jury. The right to trial by jury is only conferred if the court happens to agree with the verdict. The results are always couched in terms of whether the verdict is supported by sufficient evidence. It is reflexive in New York practice to appeal a jury verdict and often times reflexive for the

appellate court to reduce the verdict. Once the case goes to the jury, it should stay with the jury for there to be a constitutional right to trial by jury.

2. In this case, the jury was asked to determine (1) whether there was any promise at all, and (2) if there was a promise, was it a mere guarantee or a separate undertaking. After 47 minutes of deliberations, the jury found for the appellant. The jury knew exactly what it it had to determine and found that there was an independent promise. Where there is no question that the charge gave the proper law, as in the instant case, the appellant was deprived of its constitutional right to trial by jury.

LIST OF ALL PARTIES

All parties appear in the caption of the case in the court.

The appellant has no parent companies, subsidiaries or affiliates. The appellant is a closely held corporation, a family business.

The respondent was the president of Bon-Aire Industries, Inc., a public corporation, of

which Bon-Air Construction Corporation was a subsidiary.

Respondent is, upon information and belief, a director of the New York State Urban Development Corporation. Respondent is, upon information and belief, a member of the State University of New York Cosntruction Fund.

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CITATIONS TO OPINIONS BELOW

Supreme Court Appellate Division Second Department State of New York	458 N.Y.S. 2d 674
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STATEMENT OF JURISDICTIONAL GROUNDS

(i) The judgment of the New York State Court of Appeals sought to be reviewed was dated and entered on November 29, 1983.

(ii) There are no orders respecting a rehearing and no requests have been made for any extensions of time.

(iii) This is not a cross-petition for a writ.

(iv) The statutory provision conferring on this Court jurisdiction to review the judgment in question by writ of certiorari:

28 U.S.C. 1257

STATUTES INVOLVED

28 United States Code § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the

Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

New York State Constitution,
Article 1, §2

(Trial by jury; how waived)

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with

the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

STATEMENT OF THE CASE

In this case, a roofing sub-contractor, appellant, was hired by a corporate general contractor, for which the roofer was already doing one job, to do repair work on another job, namely, an Urban Development Corporation senior citizens' housing project. The original roofing contractor was not called upon to do this corrective roofing job. The original roofing contractor placed hundreds of vent pipes through the roof without roof flashings around these pipes, causing substantial water leaks, and sprayed stucco on thousands of square feet of roofing shingles, requiring the extensive corrective roofing of the appellant. The appellant is a skilled roofing mechanic. During the course of the appellant's work, he became legitimately concerned that he would not be paid. A check that was to have been paid to the appellant was later credited by the corporate general contractor to another job, and when the appellant investigated the check in question,

he found certain items crossed off. In addition, the appellant had certain conversations with the superintendent on the job which led the appellant to come down off the roof and go to see the respondent, whom the appelland knew was really the man in charge of the job. When the appellant told the respondent that he was very upset and though he was not going to get paid, the respondent stated, "I have to have this work done. Otherwise, we don't get paid for the job. I haven't become as successful as I am by not paying my debts." Later, the respondent also stated, "Don't worry, I will pay you."

From this proof, the jury properly determined that this was an independent promise not barred by the Statute of Frauds. The jury was properly instructed by the Court as to the law on the Statute of Frauds, without objection from the respondent.

The Appellate Division of the Supreme Court of the State of New York substituted its own view for that of the jury and dismissed the

complaint, which was affirmed by the Court of Appeals of the State of New York.

The jury had the opportunity to see and hear from the witnesses directly and obviously, from their verdict, rendered after forty-seven minutes of deliberation, believed that there in fact was an independent promise from which Shelly Goldstein would benefit personally.

After the Appellate Tribunals took this case from the jury, after the verdict was rendered, the comment from the appellant was, "But what happened to the jury? The jury decided in my favor."

This is a case where the right to a trial by jury is mandated by the Constitution of the State of New York. The basic question for this Court to review is whether the taking of this case from the jury after the verdict, deprived the appellant of its Constitutional right to trial by jury.

In the court of first instance, the Supreme Court of the State of New York, Rockland County, the federal question was raised in the

motion to set aside the verdict, wherein the Court stated, "I think it came down really to a jury question as to whether or not there was an independent contract, and the jury decided that there was."

The appellant's right to a jury trial was again raised in the Appellate Division, Second Department in the appellant's Brief, and in the Court of Appeals in the appellant's Brief.

ARGUMENT

The right to jury trial is immemorial; it was brought from England to this country by the colonists, and it has become a part of the birthright of every free man. The right to have a trial by jury is a fundamental right in our democratic judicial system, including our federal jurisprudence. It is a right which is justly clear to the American people, and whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts. Any seeming curtailment of this right should be scrutinized with the utmost care. It is even said that an infringement of the laws in connection with juries requires a reversal without reference to whether the defendant is able to show any injury. 47 Am Jur 2d, §12.

In New York, "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever." New York State Constitution,

Article 1, §2.

Beginning with the earliest Constitution of the State of New York in 1777, and continuing with the State Constitutions adopted 1821, 1846 and 1894, respectively, each Constitution guaranteed trial by jury, by providing that the trial by jury in all cases in which "it has been heretofore used" shall remain inviolate forever. After the first Constitution had been adopted, in 1777, the legislature began adding to the list of cases triable by jury. Carmody Wait 2d, ¶49:2.

In New York, there is no question that where a cause of action is upon a contract for a definite sum of money, or for damages ex contractu, and the existence of the contract is disputed, there is an absolute right to a jury trial. Snell v. Niagara Paper Mills, 1908, 193 N.Y. 433, 86 N.E. 460.

Thus, in the instant case, the appellant demanded a jury trial, received a jury trial, obtained a verdict in its favor, only to have

that verdict overturned by the Appellate Court. The question to be reviewed herein is whether or not the appellant's constitutional right to a jury trial was violated.

Appellant understands that it has been held that the constitutional preservation of jury trial guarantees only one jury trial and that an appeal to another Court in which judgment of the former Court can be affirmed or modified without jury trial is not an infringement of the constitutional right. Reliance Auto Repair Co. v. Nugent, 159 Wis 488, 149 N.W. 377. It is this very issue, however, which Appellant believes should be the subject of review by this Court.

To allow the Appellate Court to nullify the jury verdict is to render neuter the constitutional right to a jury trial. One can say all he wants that such an Appellate right does not violate the constitutional guaranty but in actuality such is not the case. Giving the Court this power merely

provides for a conditional right to jury trial, that is, so long as the Appellate Court happens to agree with the jury verdict.

I think we must listen to the gut of the client who says "what happened to the jury?". We all know that all too often verdicts are cut in half by the Appellate Court or, in the alternative, sent down for a new trial. This does to the populous, render the real meaning of a jury trial meaningless. If the right to a jury trial means anything, then once the case is such that the litigants are entitled to a jury trial, then, absent some error in the charge on the law or fraud or the like, the jury verdict should stand inviolate.

CPLR 4404(a) provides that after a trial of a cause of action or issue triable of a right by jury, upon the motion of any party the Court may set aside a verdict and direct that judgment be entered in favor of a party entitled to judgment. The inherent contra-

diction in that statute are the words triable of right by a jury. Obviously, if the Court has the power to set the verdict aside, then the case is not triable of right by a jury since the case ends by the Court taking the case from the jury.

It is, therefore, submitted that in America today, we do not have a right to trial by jury in a civil case but only a conditional right. Although the practice of taking the cases from the jury after verdict is as reflexive as a knee jerk response and embodied in the law as these words are printed on this paper, that does not mean that that is correct.

This is not to say, however, that a Court does not have the power to grant summary judgment where there is no genuine issue of fact that would allow the case to go to a jury.

Furthermore, there is no question that Courts both of law and equity have an inherent

right to adopt reasonable rules regulating the manner in which the right to jury trial should be asserted. People v. Metropolitan Surety Co., 164 Cal 174, 128 P 324. Such a rule, to be valid, must be reasonable and efficient to accomplish the purpose for which it was adopted and it must not in no wise contravene constitutional or statutory provisions on the subject. The right of trial by jury, where it is granted by constitutional or statutory provision, cannot be taken away or impaired by the Courts nor the Legislature. 47 Am Jur 2d, §20.

Although it has been held that it is a proper exercise of the power of the Court to direct a verdict where there is failure of proof to support the verdict and that this does not involve an encroachment upon the right of jury trial, it is this very principle which is at issue in this case. Slocum v. New York L. Ins. Co., 228 US 364, 57 L Ed 879, 33 S Ct 523. That very determination of

whether or not there is a failure of proof or want of evidence is in the province of the jury.

It is a clear and simple principle that a trial without a jury cannot properly be had where there is a right to a jury trial, but in the instant case there was a right to a jury trial but the Appellate tribunals deprived the appellant of that very right.

I submit that we must realize that no matter how we call it and no matter how it is dressed, after the verdict has been made, if the case is taken from the jury, the right to a jury trial has been stripped from our citizenry.

The New York State Court of Appeals in its decision stated: "Thus, it was the plaintiff's burden within this rule to produce evidence showing a consideration moving to defendant and showing that the parties intended, as ascertained from the language

used and from all the facts and circumstances surrounding the transaction. . .that an independent contract was created between them. . ." This very question was submitted to the jury and the jury found in the plaintiff's (appellant's) favor.

The Court of Appeals states that the purpose of the Statute of Frauds rule is evidentiary, to avoid perjury, and incidentally to serve as a cautionary measure to avoid ill-considered actions. The right to a jury trial also protects against perjury. It allows the jury to hear and see the witnesses testify and decide for themselves the facts, which they did in this case, only to be overturned by the Appellate tribunals.

Nowhere in either Appellate Court decision was there any contention that the law as charged to the jury by Judge Skahen was improper.

The decision of the Appellate Division, Second Department, clearly shows how that

Court substituted its judgment for the jury, wherein it stated that the defendant's alleged promise to pay plaintiff (appellant) for its work was not an independent obligation to pay. That was the very question submitted to the jury for which the jury found in the plaintiff-appellant's favor. For the Appellate tribunals to have taken the result of that question from the jury is to have deprived the Appellant of its constitutional right to trial by jury. As this Court is well aware, this procedure is a common practice throughout all of the Appellate Courts of our nation.

Rather than assuming that this is the way it is done and therefore it is correct, this case gives this Court the opportunity to review these practices and to truly re-establish the constitutional right to trial by jury in civil cases, which is mandated by the New York State Constitution.

It is, therefore submitted that for these very compelling reasons, this Court should accept this case for review.

There is always a Gideon.

APPENDIX
COPY OF DECISION SOUGHT TO BE REVIEWED

60 N.Y.2d 262

MARTIN ROOFING, INC., Appellant

v.

Index No. 5186/81

SHELDON S. GOLDSTEIN, also known as SHELLY GOLDSTEIN, Respondent

Court of Appeals of New York

Nov. 29, 1983.

Louis G. Adolfsen, New York City, and Stanley Weiner, Spring Valley, for appellant

Robert J. Miller and Jerry A. Weiss, New York City, for respondent

OPINION OF THE COURT

SIMONS, Judge.

Plaintiff seeks to recover $11,000 for materials and services. The sum represents an agreed price of $12,000, less $1,000 previously paid on account, due to plaintiff from Bon-Aire Construction Corporation pursuant to a roofing contract executed by the parties November 13, 1974. After completing the work in May, 1975, plaintiff sued the corporation, and when it failed to appear,

plaintiff entered a default judgment on March 14, 1977. On June 7, 1977 plaintiff initiated the present action to recover the loss from defendant, a former officer of Bon-Aire Construction Corporation and a minority stockholder of Bon-Aire Industries, its parent, claiming defendant promised to pay him. Defendant denied the promise but alleged affirmatively that such promise, if made, was unenforceable because it was an oral promise to answer for the debt of another. Plaintiff recovered a jury verdict for its damages, but the Appellate Division, 91 A.D.2d 1065, 458 N.Y.S.2d 674, reversed the judgment and dismissed the complaint finding the promise unenforceable. The issue is whether plaintiff's evidence was legally sufficient to establish a prima facie case to take defendant's promise out of the Statute of Frauds.

[1] The statute provides that a "special promise to answer for the debt,

default or miscarriage of another" may not be enforced unless it is in writing (General Obligations Law, § 5-701, subd. a, par. 2). Generally, the statute applies to circumstances in which the promisor has acted as surety of another (see 3 Williston, Contracts [3d ed.], § 475; Restatement, Contracts 2d, §112). There are surety situations in which no writing is required, however, e.g., if the promisee had no reason to know that the promisor was acting as a surety, when the duties of the principal and surety are joint or where the promise is made to the principal. We deal here with plaintiff's claim that defendant's promise is not within the statute because the promisor owed plaintiff an independent duty to pay. As to such promises, it has been stated that "[i]f, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt can-

not be the promisor's own and he is undertaking to answer for the debt of another.'" (Witschard v. Brody & Sons, 257 N.Y. 97, 99, 177 N.E. 385, quoting 1 Williston, Contracts, §472) In the latter case the promise is unenforceable in the absence of some memorandum.

[2] The purpose of the rule is evidentiary, to avoid perjury, and incidentally to serve as a cautionary measure to avoid ill-considered actions (3 Williston, Contracts [3d ed.], § 452; Farnsworth, Contracts, § 6.3; Restatement, Contracts 2d, § 112). In most oral contracts, a writing is not required because the promisor has received something and the circumstances show probable liability. When a party promises to answer for the debt of another, however, the benefit to the promisor is not apparent and so the promise, if it is to be enforceable under the statute, must either be evidenced by writing or plaintiff must prove it is supported by a new consideration moving to the promisor and beneficial to him and that the promisor

has become in the intention of the parties a principal debtor primarily liable (White v. Rintoul, 108 N.Y. 222, 227, 15 N.E. 318; and see Bulkley v. Shaw, 289 N.Y. 133, 44 N.E.2d 398; Witschard v. Brody & Sons, 257 N.Y. 97, 177 N.E.2d 385 supra; Richardson Press v. Albright, 224 N.Y.497, 121 N.E. 362). Thus, it was plaintiff's burden within this rule to produce evidence showing a consideration moving to defendant and showing that the parties intended, as ascertained from the language used and from all the facts and circumstances surrounding the transaction (Clark v. Howard, 150 N.Y. 232, 238, 44 N.E. 695), that an independent contract was created between them which obligated defendant to satisfy the corporation's debt in any event.

Plaintiff's evidence established that it was hired by Bon-Aire Construction Corporation in the fall of 1973 or 1974 when its president and sole stockholder, William

Martin, was asked to do some roofing work on low income houses the corporation was building in Rockland County. While working on that job, a company official asked Martin to look at the leaking roofs of houses in a nearby project, Lake View Village, and on November 13, 1974 plaintiff executed a contract with Bon-Aire Construction Corporation, through Marvin Lifschitz, its treasurer, agreeing to make the repairs on the Lake View Village houses for $12,000. On December 26, 1974 plaintiff sent a bill to the corporation for $6,000 to pay for the work performed and received in return the corporation's check for $4,000 on account. Subsequently the corporation's bookkeeper advised Martin that only $1,000 should be credited to the Lake View Village job and that the balance of $3,000 should be applied to other work plaintiff was doing for the corporation on the Eastchester Savings Bank building. Mr. Martin testified that he became concerned by the bookkeeper's telephone call because the

corporation then owed his company $19,000 for work completed on various jobs. He threatened to leave the Lake View Village job, but one of the corporation's employees told him not to quit, that he was working for defendant and defendant always paid his bills. Martin then went to the corporation's office and asked defendant for his money. He testified that defendant (by then no longer an officer of the corporation but a director and stockholder of its parent, Bon-Aire Industries) put his arm around him and said "Bill, I'm going to make sure you get paid. I have to have this work done. Otherwise we don't get paid fro the job. I haven't become as successful as I am by not paying my debts. I guarantee I will make sure you get paid." With that Martin went back to work and his company continued to do work for the corporation and also for defendant until 1976. Plaintiff produced evidence that at the time of this conversation the corporation anticipated receiving several hundred thousand dollars from

the Urban Development Corporation when the Lake View Village job was done.

Plaintiff was paid by the corporation for other jobs performed for it during 1975 and for subsequent jobs done for it in later years. It was not paid the $11,000 due on the Lake View Village job although the corporation offered to compromise the claim when it subsequently got into financial difficulties. Martin also testified that he received a partial payment from defendant personally on the Eastchester Savings Bank job in April, 1975 although the contract for work was with the corporation.

To prevail plaintiff was required first to establish consideration for defendant's promise. It recognizes that the required consideration may not rest upon plaintiff's return to work. That was legal consideration but the rule requires that the consideration must be beneficial to the promisor. Nor may a benefit to defendant be inferred solely because of defendant's stock holdings in

Bon-Aire Industries (see Bulkley v. Shaw, 289 N.Y. 133, 44 N.E. 398, supra; Richardson Press v. Albright, 224 N.Y. 497, 121 N.E. 362, supra). Stockholders are not liable for the debts of a corporation and thus a stockholder's promise to answer for the corporation's debts ordinarily provides no more than a remote and indirect benefit to him. That is particularly so in this case in which defendant owned no stock in the construction corporation but only a 10% minority interest in its publicly owned parent.

Plaintiff maintains, however, that the beneficial consideration to defendant for his promise is to be found in defendant's need to complete the job and free up the Urban Development Funds and his need of plaintiff to work on future jobs. Neither is legally sufficient. The benefit accruing from the Urban Development Funds was a benefit to the corporation and benefited defendant as a minority stockholder of the parent cor-

poration only indirectly. The speculation that defendant wished to retain plaintiff's goodwill for the future was also insufficient because the evidence does not establish what pecuniary advantage, if any, flowed to defendant from that employment and any benefit to him was neither immediate nor direct.

[3] More to the point, under New York law, when the original debt subsists and was antecedently contracted, an oral promise to pay it is enforceable only when there is consideration for the promise which is beneficial to the promisor and the promisor comes under a duty to pay irrespective of the liability of the original debtor (White v. Rintoul, 108 N.Y. 222, 227, 15 N.E. 318, supra; and see Richardson Press v. Albright, 224 N.Y. 497, 121 N.E. 362, supra; cf. Rosenkranz v. Schreiber Brewing Co., 287 N.Y. 322, 39 N.E.2d 257; see, generally, Calamari and Perillo, Contracts [2d ed.], § 19-8, p. 687). Thus, even if there was sufficient consideration to defendant, he

could not be liable if he was acting as a surety of the corporation.

There are several recognized tests for determining whether the promise created an independent duty to pay irrespective of the original debtor's liability which may be applied here (see 3 Williston, Contracts [3d ed.], § 462).

[4] First, as noted, there was no beneficial consideration to defendant. Second, it is said that presumptively the new promise is unenforceable unless the corporation was discharged from its underlying obligation. Obviously the corporation's debt was not discharged by the promise here because plaintiff sued the corporation on it. Further, the evidence supports the Appellate Division's finding that these parties assumed that the corporation was to remain liable and defendant's promise was to be performed only if the corporation defaulted. Plaintiff executed contracts with the corporation both before and after this job without additional

assurances of payment and when it was not paid for the Lake View Village work, it looked to the corporation first for payment. Similarly, although defendant's oral promise was addressed to plaintiff's claim of $19,000, which sum included $8,000 due on jobs other than Lake View Village, plaintiff sought and received payment of at least part of $8,000 apparently from the corporation. (That sum of $2,500 was allegedly paid by defendant personally for Eastchester Savings Bank, but it is not clear from the evidence whether the payment was made after a demand on the corporation or after a demand on defendant.) Despite its difficulties, plaintiff never made formal or written demand for payment on defendant until it commenced this action. Indeed, it sued the corporation first, and did so without naming defendant as a party, and took judgment against it on the claim (see Bulkley v. Shaw, 289 N.Y. 133, 136, 44 N.E. 398, supra). Even when it did sue defendant, the original complaint sought only damage for work, labor

and services, and did not allege that defendant had made an independent promise to pay plaintiff. It was not until the complaint was amended, some five years after the promise was made, that plaintiff's present claim was asserted for the first time. Finally, the form of the promise is significant. The language used, as plaintiff stated it, indicated that it was "guarantee", i.e., that defendant was acting as a surety "to make sure you [plaintiff] get paid" (see Witschard v. Brody & Sons, 257 N.Y. 97, 99, 177 N.E.2d 385, supra).

Plaintiff contends alternatively that it may recover under the "main purpose rule" which permits defendant's oral promise to be enforced even though he acted as surety of the corporation. The "main purpose rule" rests upon a recognition that in many cases the purpose underlying the statute may be satisfied if the evidence establishes that the promisor's main purpose (or leading object, as it is also called) is a benefit

which he did not enjoy before the promise. The elements of the rule are consideration for the promise and a benefit which accrues to the promisor (see, generally, 3 Williston, Contracts [3d ed.], § 470; Farnsworth, Contracts, § 6.3, pp. 388-390; Restatement, Contracts 2d, §116; Calamari, Suretyship Statute of Frauds, 27 Fordham L.Rev. 332, 341; Conway, Subsequent Oral Promise to Perform Another's Duty and the New York Statute of Frauds, 22 Fordham L.Rev. 119). It is said that the benefit must be immediate, personal, pecuniary and direct (Calamari and Perillo, Contracts [2d ed.], § 19-6; see, also, Restatement, Contracts 2d, § 116, Comment b). The rule is not recognized in this state but whether it or the New York rule is applied, the evidence does not establish consideration beneficial to defendant and plaintiff's complaint was properly dismissed.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

COOKE, C.J., and JASEN, JONES, WACHTLER, MEYER and KAYE, JJ., concur.

Order affirmed, with costs.

APPENDIX

DECISION OF INTERMEDIATE APPELLATE COURT

MARTIN ROOFING, INC., Respondent

v.

Index No. 5186/81

SHELDON S. GOLDSTEIN, etc., Appellant.

Supreme Court, Appellate Division, Second Department

Jan. 31, 1983.

Manus & Weiss, New York City (Robert J. Miller and Michael D. Blutrich, New York City, of counsel, for appellant.

Stanley Weiner, Spring Valley, for respondent

Before MANGANO, J.P., and WEINSTEIN, BROWN and NIEHOFF, JJ.

MEMORANDUM BY THE COURT

In an action to recover damages based upon an oral contract, defendant appeals from a judgment of the Supreme Court, Rockland County, entered March 16, 1982, which is in favor of plaintiff in the principal sum of $11,000, upon a jury verdict.

Judgment reversed, on the law, without costs or disbursements, and the complaint is dismissed.

[1,2] An oral promise to guarantee the debt of another is barred by the Statute of Frauds (General Obligations Law, §5-701). However, the oral promise may be taken out of the Statute of Frauds if two requirements are met. First, the promise must represent an independent duty of payment, irrespective of the liability of the principal debtor, and second, the promise must be based upon new consideration which moves to the promisor and is beneficial to him (Richardson Press v. Albright, 224 N.Y.497, 501, 121 N.E. 362; see Lang, Ltd. v. Birch Holding Corp., 72 A.D.2d 806, 421 N.Y.S.2d921). Herein, the defendant's alleged promise to pay plaintiff for its work was not an independent obligation to pay. Rather, defendant's obligation was secondary to that of the corporation of which defendant was an officer and stockholder, and for which plaintiff performed work as an independent contractor. Moreover, the original corporate debtor was not relieved of its obligation by

virtue of the defendant's promise. This is evidenced by the fact that plaintiff did not look to the defendant for moneys owed until after the corporation had defaulted (see Bulkley v. Shaw, 289 N.Y.133, 136, 44 N.E. 2d 398). Inasmuch as the above requirements have not been met, we hold that the defendant's oral promise was to answer for the debt of another. Consequently, the promise is unenforceable and recovery is barred by the Statute of Frauds.